No. 87-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

YESHIVA UNIVERSITY,

Petitioner,

— VS. —

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Yeshiva University ("Yeshiva"), submits this brief in reply to Respondents Brief in Opposition to Petition for Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit ("Respondents' Brief"). Respondents minimize the glaring conflict between the opinion below and decisions of this Court and of other Courts of Appeals by ignoring that opinion's fundamental holdings.

REPLY TO RESPONDENTS' ARGUMENTS

I

THE CLEAR EFFECT OF THE COURT OF APPEALS' DECISION IS TO SHIFT THE BURDEN OF PROOF TO TITLE VII DEFENDANTS AND TO DENY DISTRICT COURTS THE DISCRETION TO WEIGH THE EVIDENTIARY VALUE OF REGRESSIONS WHICH OMIT SIGNIFICANT QUALITATIVE FACTORS

Respondents erroneously argue that in *Sobel IV* the Court of Appeals did not impose on Yeshiva the burden of proving the invalidity or unreliability of their regression model. For support, respondents misquote a passage from *Sobel IV* in which the Court of Appeals stated that ". . .Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable. . . ." (Respondents' Brief at 7-8.)[1] The text which precedes this passage contradicts

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[1] Respondents' Brief omits portions of the text they purport to quote from *Sobel IV*. The quoted text at pages 7-8 of Respondents' Brief should read:

> . . . .Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of relevance for each particular variable it contends *plaintiffs ought to include. Ideally, Yeshiva would seek to do so by offering its own regression that includes the variable it contends* improperly *was* omitted.

(A-28) (emphasis supplied to show omitted language).

The omitted text suggests that Yeshiva's rebuttal to respondents' statistics should be in the form of a regression analysis that includes each variable which respondents improperly omitted. (*Id.*) Because many of the variables respondents omitted are non-quantifiable, Yeshiva cannot possibly do what the Court of Appeals suggests is the proper approach. Later in its decision, the Court of Appeals essentially bars any other approach by holding that Yeshiva must prove statistically that respondents' showing of a salary disparity would be weakened by inclusion of any omitted variable. (A-27-28.)

respondents' position, however, stating that where a plaintiff's regression analysis omits a variable which is a determinant of pay, it is the employer's burden to prove that if the variable were included "the apparent gender disparity [would be] reduced." (A-28.) This shift in the burden of proof is plainly spelled out at several points in *Sobel IV*:

> We read *Bazemore [v. Friday] to require a defendant* challenging the validity of a multiple regression analysis *to make a showing* that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis.

(A-27-28) (emphasis supplied).

> *Bazemore...requires Yeshiva to show* that the failure to include a proxy causes an actual underadjustment.

(A-29) (emphasis supplied).

> ...the district court should discount the weight to be accorded plaintiffs' regression analysis because of the failure to include an explanatory variable *only upon a showing by the defendant* that the missing variable is a determinant of salary and correlates with sex....

(A-32) (emphasis supplied). Such language is consistent only with the allocation of a burden of proof and a shift in the risk of nonpersuasion to the defendant. *Watson v. Fort Worth Bank and Trust ("Watson")*, __U.S.__, 56 U.S.L.W. 4922, 4928 (1988), and cases quoted from therein (Justice Blackmun concurring in part).

A plaintiff's introduction of statistics showing a gender-based disparity does not, however, serve to shift the burden of proof to the defendant. As recently stated by a plurality of this Court in *Watson*, shifting the burden of proof to the defendant to refute a statistical analysis offered by the plaintiff would improperly raise a presumption in the plaintiff's favor: "...courts or defendants [are not] obliged to assume that plaintiffs' statistical evidence is reliable." 56 U.S.L.W. at 4927 (plurality opinion). The Court of Appeals' opinion in *Sobel IV* therefore stands in

apparent conflict with the evidentiary standards set forth by the *Watson* plurality.

In *Watson*, seven Justices expressed general agreement with the proposition that in a disparate treatment case the plaintiff bears the burden of proof at all times.[2] *Id.* at 4924, 4929. The Court was divided, however, on the evidentiary standards applicable to a disparate impact case involving the use of subjective selection practices. *Id.* at 4926-27. Since in *Sobel IV*, the Court of Appeals dissolved the accepted distinction between disparate treatment and disparate impact, stating that "this distinction is not relevant to a *Bazemore* claim" (A-19), it is unclear what impact, if any, *Watson* has had on the issues raised in this case.[3]

Justice O'Connor's plurality opinion, in which three Justices joined, emphasized that applying disparate impact theory to subjective job criteria would not have a chilling effect on legitimate business practices because of the "high standards of proof" required of plaintiffs. 56 U.S.L.W. at 4948.[4] The plurality noted first that the plaintiff's burden "goes beyond the need

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[2] Justice Stevens concurred in the judgment but challenged the adequacy of the factual context for the plurality's elaboration of evidentiary standards. *Watson*, 56 U.S.L.W. at 4931 (Justice Stevens concurring). That concern does not apply to the present case in which the factual context is well established.

[3] Without elucidating its rationale, the Court of Appeals fashioned a hybrid claim which is "not properly characterized solely as one of disparate impact", nor solely disparate treatment. (A-18.) Perhaps this notion of a hybrid "*Bazemore* claim" led the Court of Appeals to deviate from the rule that in a disparate treatment case the burden of proof never shifts to the defendant. Accordingly, in order to answer the first question presented in Yeshiva's petition, the Court may wish to reach as a threshold matter the nature of respondents' claim, before determining what evidentiary standards apply. Thus, the issue raised and left undecided in *Watson* — in what kind of case and on what set of facts should the burden of proof be shifted to the defendant (if ever) — arises again here.

[4] In the plurality's view, the high level of proof required of plaintiffs in such cases is consistent with the Congressional intent that employers not be required

(Footnote continued)

to show that there are statistical disparities ...." *Id.* at 4926. The plurality further held that the plaintiff's statistics are not presumed to be reliable (*id.* at 4927), that the defendant has wide latitude in challenging the plaintiff's statistics (*id.*), that the defendant is not required to produce particular types of evidence in rebuttal (*id.* at 4927-28), and that the ultimate burden of proof remains with the plaintiff at all times (*id.* at 4927).

The plurality also held that in judging whether the plaintiff's evidence is significant or substantial enough to establish a *prima facie* case, the District Court must consider the employer's case, which can be quite broad: the employer may adduce countervailing evidence, impeach the reliability of the plaintiff's statistical evidence, or disparage by argument the probative weight to be accorded the plaintiff's evidence by showing, for instance, that the data are incomplete or the statistical techniques inadequate. *Watson*, 56 U.S.L.W. at 4927. Quoting from the concurring opinion of Chief Justice Rehnquist in *Dothard v. Rawlinson*, 433 U.S. 321, 338-39 (1977), the plurality affirmed that:

> '[i]f the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.'

56 U.S.L.W. at 4927.

In *Sobel IV*, however, the Court of Appeals, interpreting this Court's decision in *Bazemore v. Friday* ("*Bazemore*"), 478 U.S. 385 (1986), criticized Yeshiva for "simply" offering evidence

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to adopt quotas or engage in preferential treatment. 56 U.S.L.W. at 4926. This Congressional mandate is equally applicable to disparate treatment analysis and, accordingly, the *Watson* plurality's standard of proof analysis would seem to apply to statistical proof of the subjective employment decisions at issue in the case at bar.

which included: statistical analyses "packed with all of the [quantifiable] factors it contended plaintiffs should have included...." (A-28); the testimony of fact and expert witnesses that respondents' statistical analyses omitted principal determinants of pay; econometric testimony that the omission of variables to reflect these pay determinants had the likely effect of inflating the sex coefficient; testimony that objective statistical tests had shown respondents' studies to be utterly unreliable; evidence that respondents' studies were based upon incomplete and inaccurate data; detailed and lengthy reports by four experts criticizing respondents' statistics; and briefs and arguments by counsel which highlighted fatal deficiencies in respondents' statistical proof. (A-28-29.) The District Court was held to have erred by even considering this evidence and these arguments, together with respondents' evidence, because Yeshiva did not conclusively establish that the omission of qualitative variables caused an inflation of the sex coefficient. (A-28-30.)

Sobel IV, thus, is inconsistent with the language and thrust of the four Justice plurality opinion in *Watson*. It is unclear, however, how the four concurring Justices or Justice Kennedy (who took no part in the decision) would view the evidentiary burdens as they apply to this "*Bazemore* claim".

Since the Court of Appeals' interpretation of *Bazemore* appears to conflict with *Watson*; since it is unclear whether the evidentiary standards applicable to disparate treatment, to disparate impact, or to some different form of analysis apply here; since the absence of a clear majority in *Watson* has clouded the evidentiary issues discussed in that decision; and for all the reasons set forth in its petition, Yeshiva respectfully suggests that the Court find the present case appropriate for review. The need for review of the issues raised by this case is particularly compelling since statistical proof of discrimination necessarily involves an investment of substantial time and expense by the litigants.[5] The allocation of evidentiary burdens described in

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[5] As an example, this action was in pre-trial discovery for seven years. (A-2.) As of 1984, Yeshiva had already spent nearly $2 million, mostly in the

(Footnote continued)

Sobel IV has already influenced the preparation of statistical cases and the reception of statistical evidence in courtrooms across the country. If *Sobel IV* is, in this respect, an erroneous interpretation of this Court's decisions, then the parties in those actions (as well as the parties here) will face still more years of appeals and retrials.

II

THE DISTRICT COURT FOUND NO PROBATIVE EVIDENCE OF DISCRIMINATION AT THE COMMENCEMENT OF THE ACTIONABLE TIME PERIOD AND THE SECOND QUESTION PRESENTED IS THEREFORE SUPPORTED BY THE RECORD

In its petition, Yeshiva urged this Court to make clear that *Bazemore* does not require a District Court finding on whether there were gender-based pay differentials at any time prior to the applicability of Title VII, if the District Court finds no meaningful proof of (a) pay differentials at the commencement of the actionable time period, and (b) disparate treatment thereafter. The Court of Appeals had inferred this requirement from its reading of *Bazemore* and this was a basis for its reversal of *Sobel III*. (A-27.)

Respondents argue that one premise of Yeshiva's position — that the District Court found no meaningful evidence of pay differentials at the commencement of the actionable time period — is not supported by the record. (Respondents' Brief at 8-11.) Respondents assert that the District Court "impliedly if not expressly found that there was discrimination before the act became effective. . . ." (*Id.* at 10.) Respondents' position is not

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preparation of its statistical defense to the respondents' claims. (Joint Appendix in the United States Court of Appeals at A-224-25.) Considerable additional expenses have accrued during the action's long subsequent journey through the federal courts (as reflected in *Sobel II*, *III* and *IV*). Much of this expenditure has been caused by developments in Title VII law which have caused the courts below to repeatedly reevaluate the evidence adduced at trial in light of those developments.

only incorrect but irrelevant as it confuses "pre-Act" with "pre-limitations" proof, an error of great significance which was made by the Court of Appeals as well. (*See* Petition at 23-24.)

In *Sobel I*, the District Court found that respondents' statistics were neither valid nor reliable (A-80), and that "[t]he anecdotal evidence, or, more accurately, the lack thereof, reflected the same absence of sexual discrimination that was suggested by the defendant's statistical evidence." (A-84.)[6] In *Sobel III*, decided after *Bazemore*, the District Court was more specific concerning the absence of evidence of pre-Act discrimination:

> . . . little evidence was offered to establish if, or how, the defendant discriminated against women prior to 1972....

(A-38.) In any event, the actionable time period commenced in 1974 and, as the tables in *Sobel I* show, there was no meaningful statistical evidence of discrimination in that year as to either the entire class or any sub-set. (A-69, 71, 73.) Moreover, even the "sparse" anecdotal evidence "concerned matters predating the statute of limitations date of December 20, 1974." (A-85.)

Given the absence of evidence of disparate salaries on December 20, 1974 and the uncontested finding of neutral treatment thereafter, there is a clear record upon which this Court can, and should, clarify its holding in *Bazemore*. That decision does not require a finding on whether there were gender-based pay differentials in the pre-Act period, if there is no evidence that discriminatory salaries were set and carried over into the actionable time period.

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[6] The District Court's reference to a report of the Senate Committee on Women's Rights is in no respect contrary to its ultimate conclusion that there was no meaningful proof of discrimination at the commencement of the actionable time period. First, the report, which was based on gross, unadjusted salaries, was deemed to have so little probative value that at trial respondents themselves did not introduce it as proof of pre-Act discrimination. Second, the report was issued in 1972 and covered salaries during an even earlier time period. The actionable time period did not commence until December 1974.

(Footnote continued)

III

THE OFFICIAL REPORTED OPINION OF THE COURT OF APPEALS IS CORRECTLY REPRODUCED IN YESHIVA'S APPENDIX

Respondents erroneously describe the official amended report of the Second Circuit's opinion in *Sobel IV*, appearing at 839 F.2d 18, and reproduced in Yeshiva's Appendix (A-1-34), as "incomplete and expurgated" and "incorrectly reported". (Respondents' Brief at 1.)

To the contrary, the Clerk of the Second Circuit, the chambers of the decision's author, Judge Pratt, and representatives of the West Publishing Company have confirmed to Yeshiva's counsel that the decision of the Court of Appeals in *Sobel IV* is correctly reported at 839 F.2d 18. The slip opinion originally prepared by Judge Pratt included the paragraph referred to by respondents in their brief, but the Court of Appeals deleted that paragraph before submitting it to the West Publishing Company for official publication in the Federal Reporter, Second Series. (*See* letter from Judge Pratt's chambers to the West Publishing Co., dated February 16, 1988, attached as Exhibit A.)

In any event, consideration of the omitted paragraph as part of *Sobel IV* provides no greater justification for the Court of Appeals' reassignment order than does the official decision standing alone. That paragraph merely amplifies the Court of Appeals' impression that, after *Bazemore*, the District Judge's efforts "become inadequate". (A-33.) Reassignment on this basis is an improper usurpation of Congressionally delegated District Court authority. (Petition at 26.)

In *Sobel I*, the District Court found that the significance of the report was limited to establishing that "a conscious effort was made after 1972 to avoid any discrimination in salaries" (A-85), a finding that supports Yeshiva's argument that there was no discrimination by 1974, and is far from a finding that there was pre-Act discrimination.

CONCLUSION

Respondent has offered no substantial basis for opposing Yeshiva's petition. In addition, *Watson* has raised further issues which may be promptly resolved in the context of the present case. Therefore, Yeshiva's Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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EXHIBIT A

A-1

UNITED STATES COURTHOUSE
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UNIONDALE, NEW YORK 11553

CHAMBERS OF
GEORGE C. PRATT
CIRCUIT JUDGE

February 16, 1988

Ms. Lyla Davies
West Corrections
West Publishing Co.
50 W. Kellogg Blvd.
P.O. Box 64526
St. Paul, MN. 55164

CORR MADE
MAR 4

Dear Lyla,

This is to confirm a conversation I had this afternoon with your office to have a change made in the opinion authored by Judge Pratt in Sobel v. Yeshiva University, Docket No. 87-7373 (2d Cir. February 4, 1988). At our instruction, West will delete a paragraph from section III (B) of the opinion. The paragraph begins, "Nevertheless, Bazemore exists, and we are concerned . . . ." In the second circuit slip opinion, the paragraph appears on page 1498.

I was informed that deleting the paragraph can be done in time so that it will not appear either in the advance sheets or in the hardcover version of Fed.2d, and we appreciate your prompt attention which makes that possible.

Sincerely,

Sam Marcosson
Law Clerk to Judge Pratt